

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
BRIEF**

ORIGINAL
No. 77-4057

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

Nos. 77-4057, 77-4067,
77-4068, 77-4073,
77-4074, 77-4075

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
v. *Petitioners,*

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents,

MCI TELECOMMUNICATIONS CORP., *et al.*,
Intervenors.

On Petition for Review of Orders of the
Federal Communications Commission

**BRIEF FOR INTERVENOR
COMPUTER AND BUSINESS EQUIPMENT
MANUFACTURERS ASSOCIATION**

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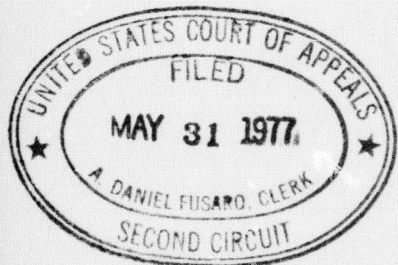




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ISSUES PRESENTED

The issues presented by the Petition for Review filed herein by the American Telephone and Telegraph Company are:

1. Where carrier limitations on resale and sharing of private line telecommunications services present policy issues of industry-wide importance and consequence, did the Federal Communications Commission abuse its discretion by considering such matters in the context of a statutory rulemaking proceeding?

2. Assuming that the effect of its action below represented a "prescription" within the meaning of Section 205(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 205(a), did the Commission's rulemaking procedures satisfy the procedural and substantive requirements of that provision?

COUNTERSTATEMENT OF THE CASE

In view of the issues addressed herein, any further Counterstatement of the Case, other than that presented in the Brief of Respondents, the Federal Communications Commission (Commission), is unnecessary.

SUMMARY OF ARGUMENT

In its proceeding below, the Commission undertook comprehensive inquiry into the lawfulness of an industry-wide practice being followed by virtually all communications common carriers subject to its jurisdiction. This practice, reflected in tariff prohibitions filed by communications common carriers with the Commission, generally precluded customers from either sharing or reselling the communications services offered by those carriers. After two years of rulemaking hearings, the Commission found such practices to be unjust and unlawfully discriminatory.

An administrative agency is given great latitude in choosing among the procedural tools it will utilize in seeking to discharge its statutory responsibilities. The Com-

mission below determined that the issues raised by the carrier practices involved—and their ultimate disposition—were most appropriate for consideration in a rulemaking context. And, in fact, the matters to be evaluated by the Commission—having industry-wide application and being essentially prospective in nature—were precisely the type for which the courts have viewed a rulemaking approach to be well suited. The Commission's decision to proceed by rulemaking in this instance was, therefore, well within the permissible bounds of its discretion.

AT&T's claims notwithstanding, trial-type proceedings were not mandated in this instance. The procedural requirements of Section 205(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 205(a), are not inconsistent with the exercise of the Commission's rulemaking authority. Moreover, to the extent the Commission's decision below is viewed to be a "prescription" within the meaning of Section 205(a), all of the procedural requirements of that provision were satisfied nonetheless. The Commission has made the requisite statutory finding and it has provided a "full opportunity for hearing". In addition, there has been no showing that any party has been prejudiced by the procedural approach followed by the Commission below.

ARGUMENT

I. THE COMMISSION'S DETERMINATION TO CONSIDER THE ISSUES BELOW IN THE CONTEXT OF A RULEMAKING PROCEEDING WAS WITHIN THE BOUNDS OF ITS PERMISSIBLE DISCRETION.

A. The Commission Has Broad Discretion In Choosing The Most Appropriate Procedural Approach To Formulate Telecommunications Policy, And The Scope Of Review Of Such Determinations Is Highly Limited.

The Communications Act requires the Commission "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide and world-wide wire and radio communication service with adequate facilities." 47 U.S.C. § 151. To accomplish this overall objective, the Act confers upon the Commission appropriately broad and flexible procedural powers. Section 303(r) authorizes the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law as may be necessary to carry out the provisions of this Act . . .". 47 U.S.C. § 303(r). Section 4(i) permits the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i). Section 4(j) specifically provides that the Commission may "conduct its proceedings in such a manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. § 154(j).

The courts have recognized these statutory provisions to grant the Commission wide discretion in deciding which procedures are most appropriate in a particular

type of situation.¹ And that recognition reflects the basic rule established by the Supreme Court some thirty years ago:

"[T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency."

SEC v. Chenery Corp., 332 U.S. 194, 203 (1947). See also *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936) and *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942).

The discretionary latitude thus outlined has been continuously endorsed in the face of contentions that agencies were bound to consider particular questions on an *ad hoc* basis. See, e.g., *Grain Elevator, Flour and Feed Mill Workers v. NLRB*, 376 F.2d 774, 781 (D.C. Cir. 1967); *Air Line Pilots Association, International v. Quesada*, 276 F.2d 892, 897 (2d Cir. 1960); *United Air Lines, Inc. v. CAB*, 228 F.2d 13, 16 (D.C. Cir. 1955). And, particularly where the subject matter of Commission consideration is one of basic policy has the agency's choice of rulemaking been found to be an appropriate procedural vehicle. *American Commercial Lines, Inc. v. Louisville & N.R.R. Co.*, 392 U.S. 571, 591-92 (1968); *FCC v. WJR, The Goodwill Station, Inc.*, 337 U.S. 265, 283 (1949); *Hale v. FCC*, 425 F.2d 556, 560 (D.C. Cir. 1970).²

¹ See, e.g., *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-173 (1968). See also *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 90 (1953), where the Court pointed out that the exercise of the Commission's statutory responsibilities "leaves wide discretion and calls for imaginative interpretation."

² See also *American Trucking Associations v. United States*, 344 U.S. 298, 311-12 (1953) and *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1252 (D.C. Cir. 1973).

Reflecting the Commission's broad discretion in deciding what procedural approaches are most appropriate to achieving its substantive purposes, it is now settled that the courts are not to disturb the Commission's determinations except in the most "compelling" cases—where it can be shown that the agency has not "kept within the bounds of [its] administrative powers."³ In this connection, it is "axiomatic that [the reviewing court] may not substitute [its] judgment for that of the agency." *Home Box Office, Inc. v. FCC*, No. 75-1280 *et al.*, slip op. at 49 (D.C. Cir. March 25, 1977), citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). As this Court, itself, has concluded, its "function is merely to keep the Commission within its statutory bounds, not to make determinations reserved by Congress to the agency." *National Association of Motor Bus Owners v. FCC*, 460 F.2d 561, 565 (1972).

Clearly, therefore, "the ultimate choice of procedure (in the absence of a statutory mandate) is left to the discretion of the agency involved, and will be reversed only for an abuse of discretion." *Bell Telephone Co. of Pennsylvania v. FCC*, 503 F.2d 1250, 1266 (3d Cir. 1974), *cert. den.*, 422 U.S. 1026 (1975), *reh. den.*, 423 U.S. 886 (1975). See also *McManus v. CAB*, 310 F.2d 762, 763 (2d Cir. 1962). To sustain the Commission's choice of procedural tools under the statute, the court "need not find that [the Commission's] construction is the only reasonable one or even that it is the result" which this court "would have reached had the question arisen in the first instance in judicial proceedings." *Philadelphia Television Broadcasting Co. v. FCC*, 359 F.2d 282, 283-84 (D.C. Cir. 1966), quoting *Udall v. Tall-*

³ *Permian Basin Area Rate Cases*, 390 U.S. 747, *reh. den. sub nom.*, *Bass v. FPC*, 392 U.S. 917 (1968); *American Telephone and Telegraph Co. v. United States*, 299 U.S. 232 (1936); *American Power and Light Co. v. SEC*, 329 U.S. 90 (1946).

man, 380 U.S. 1, 16 (1965). Rather, the court need only conclude that the Commission acted within the bounds of its broad discretion to proceed by rulemaking.

B. The Commission's Decision to Proceed By Rulemaking In This Instance Was Entirely Appropriate To The Matters Being Considered.

As postulated by the Commission in its decision below,⁴ the basic question involved was

"... whether, and under what conditions, subscribers of the various service offerings of communications common carriers should be allowed to resell such services to others or to participate with others in the sharing or joint use of such services, and, if so, whether and to what extent the Commission should regulate any such resale or shared use."⁵

In its Notice of Inquiry and Proposed Rulemaking initiating the proceeding below,⁶ the Commission concluded that "[s]ince the heart of this proceeding is to establish broad policies, we believe that it is most appropriate to invite public participation through the submission of comment, information, criticism and recommendation in written form as is generally the case in Section 553 'notice and comment' rulemakings."⁷ In the Commission's view:

"It would be inappropriate to consider this question in the context of some particular item, such as

⁴ *In the Matter of Regulatory Policies Concerning Resale & Shared Use of Common Carrier Services and Facilities*, 60 F.C.C.2d 261 (1976); hereinafter cited as "*Report & Order*". See Joint Appendix (hereinafter "J.A."), pages 28-140.

⁵ *Report & Order*, ¶ 1; 60 F.C.C.2d at 262; J.A. 29.

⁶ *In the Matter of American Trucking Association, Inc. v. American Telephone & Telegraph Co.—Regulatory Policies Concerning Resale and Shared Use of Common Services and Facilities*, 47 F.C.C.2d 644 (1974); hereinafter cited as "*Notice*". J.A. 12-27.

⁷ *Notice*, ¶ 34; J.A. 26.

an application for authorization for service, a tariff filing or a complaint against a particular carrier. The nature of the issues that must be considered, their complexity, their basic impact on the overall structure of the industry, the number and diversity of parties interested in the issues as well as the expedition with which they must be resolved compels the conclusion that the fulfillment of our regulatory mandate requires that the questions that have been raised in the context of various discrete matters before us be considered in a broad rulemaking proceeding."⁸

The rulemaking proceeding upon which the Commission thus embarked spanned more than two years, during which period the Commission received some 98 initial, reply and response comments from the public and affected carriers.⁹ Recognizing that the existing carrier prohibitions against resale and sharing restrict the subscribers' use of their communications service, the Commission required the carriers to justify the restrictions as just and reasonable under Section 201(b) of the Communications Act.¹⁰ Similarly recognizing that these carriers, and American Telephone and Telegraph Company (AT&T) in particular, nevertheless permitted such resale and sharing in certain circumstances of the carriers' choosing,¹¹ the Commission also required the carriers to justify the discrimination thus presented.

⁸ *Id.* at ¶ 4; J.A. 13.

⁹ In an effort to afford all interested parties the fullest opportunity to present their views on the matters at issue, the Commission departed from its normal rulemaking practice (see 47 C.F.R. § 1.415) and permitted a third round of submissions (response comments).

¹⁰ 47 U.S.C. § 201(b).

¹¹ AT&T tariffs, for example, permitted Western Union and so-called "Composite Data Service Vendors" to resell its services. See *Report & Order*, ¶¶ 27-33; J.A. 48-53.

On the basis of the extensive rulemaking proceeding undertaken and the voluminous submissions received, the Commission found as a matter of statutory policy that "existing restrictions on the sharing and resale of private line service are unjust and unreasonable and unlawfully discriminatory"¹² and ordered "all common carriers subject to [its] jurisdiction . . . [to] file revised tariffs . . . eliminating restrictions on the resale and shared use of their services which are not consistent with these policies."¹³

As the brief summary above indicates, the principal issues to be resolved below were particularly suited to the rulemaking approach followed by the Commission. The Commission's investigation admittedly concerned a matter of significance to *all* communications common carriers subject to the Commission's regulatory jurisdiction,¹⁴ in addition to a great many users of communications services furnished by these carriers. It was clearly industry-wide in its applicability. Moreover, the whole thrust of the Commission's decision was prospective in nature, designed to establish policy for the future. It was not intended, nor did it presume, to be an "adjudication" of past carrier practices. There was no dispute as to what those practices had been. The question essentially was what they should be.

In this connection, there were no significant factual issues which could not properly be resolved in a rule-making context. As summarized by the Commission,¹⁵

¹² *Report & Order*, ¶ 6; J.A. 32.

¹³ *Id.*, ¶ 132; J.A. 109.

¹⁴ While the Commission generally refers to the restrictions on resale and sharing found in AT&T's tariffs, the agency recognizes that "many carriers" have similar restrictions (*Report & Order*, ¶ 5; J.A. 31) and that they are found in "virtually all" carrier tariffs. (*Id.*, ¶ 27; J.A. 48.)

¹⁵ *Report & Order*, ¶ 38; J.A. 57.

AT&T and others had urged the retention of resale and sharing restrictions on the grounds that their removal would:

- (a) adversely impact carrier revenues or rate structures;
- (b) in some manner have discriminatory results;
- (c) interpose a middleman between carriers owning and operating transmission facilities and the using public; and
- (d) lead to competition between regulated and unregulated entities in the provision of communications services.

Except for the first of these contentions, the AT&T allegations raised essentially policy and legal—not factual—questions: Would a discrimination result? Should middlemen be allowed to operate? Should competition be permitted? In a very real sense, all of these questions ultimately concern the principal contention of AT&T below: that unlimited resale and sharing would adversely impact carrier revenues and rate structures. There has been no demonstrable showing by AT&T, however, that the rulemaking procedures followed by the Commission were not adequate to properly resolve such matters.

The courts are virtually unanimous in concluding that rulemaking procedures are ideally suited to resolving broad policy issues such as that confronting the Commission here, and that agencies are well within the bounds of permissible discretion when conducting their business in this fashion.¹⁶ The general principle has recently been

¹⁶ See *North Carolina Utilities Commission v. FCC*, Nos. 76-1002 *et al.*, slip op. at 45 (4th Cir. March 22, 1977), where the court pointed out that

“ . . . no general principle of administrative law forces all agencies to conduct exhaustive economic impact studies before taking action.”

set forth by the Ninth Circuit Court of Appeals in *Washington Utilities & Transportation Commission v. FCC*, 513 F.2d 1142 (1975), where the court approved a Commission policy allowing open entry to new carriers in providing specialized private line communications service. Despite objections below that the rulemaking procedures followed by the Commission in reaching its decision were inadequate to address factual arguments that such open entry would "divert interstate business from the established carriers" and "impact" upon rates for local users,¹⁷ the court stated:

"The problem confronting the Commission met uniformly accepted standards for utilization of rulemaking procedures: It affected large numbers of individual situations, it involved determination of a general policy applicable equally to all in the affected class, case-by-case adjudication would require repetitious determination of precisely the same issue, it concerned future events, and it required a broad judgment, legislative in nature, rather than resolution of a particular dispute of fact." (513 F.2d at 1160)¹⁸

¹⁷ These arguments are again raised by AT&T herein. See AT&T Brief at 8-9.

¹⁸ The essential principle is expressed in similar fashion by the District of Columbia Circuit in *Independent Bankers Association of Georgia v. Board of Governors of the Federal Reserve System*, 516 F.2d 1206 (1975):

"As a general matter, agencies employ rulemaking procedures to resolve broad policy questions affecting many parties and turning on issues of 'legislative fact.' Adjudicatory hearing procedures are used in individual cases where the outcome is dependent on the resolution of particular 'adjudicative facts'." (516 F.2d at 1215)

The distinction, the Court notes, is "well summarized by Professor Davis":

"'Adjudicative facts are the facts about the parties and their activities, businesses, and properties. Adjudicative facts usually answer the questions of who *did* what, where, when,

It is manifest that the instant case, involving broad industry-wide policy questions of a "legislative" nature, meets the "uniformly accepted standards for utilization of rulemaking procedures." *Washington Utilities & Transportation Comm.*, *supra*, at 1160. The AT&T position that the existence of a single factual question (concerning the economic impact on it of the Commission's order) requires something more is plainly insufficient to justify this Court concluding that the Commission abused its discretion in proceeding by rulemaking below. As the Ninth Circuit so incisively recognized, "[r]ulemaking is hardly limited . . . to the certainly rare and probably entirely hypothetical situation in which the facts relevant to determination of a question of general policy are beyond dispute." *Washington Utilities & Transportation Comm.*, *supra*, at 1165.

In addition, the fact that the Commission's decision also had tariff consequences for many, if not all, communications common carriers does not invalidate the rulemaking approach. See *North Carolina Utilities Commission*, *supra*. Indeed, if such a view were adopted, administrative agencies would be virtually paralyzed in their efforts to regulate carriers subject to their jurisdiction. It would, moreover, embroil the agency in a morass of adjudicatory proceedings from which it would never emerge.¹⁹ For this court to accept the AT&T position

how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion.' 1 Davis, *Administrative Law Treatise* § 7.02 at 413 (1958)."

(516 F.2d at 1215, n. 26; emphasis added.)

¹⁹ See *Bell Telephone Co. of Pa.*, *supra*, at 1265, 1266, where the Third Circuit Court of Appeals rightly observed:

"Non-evidentiary rulemaking permits broad participation in the

that only trial-type adjudicatory hearings will satisfy the statutory requirements in cases where carrier tariffs may be affected—however indirectly—would have the practical effect of precluding the Commission from ever engaging in common carrier rulemaking, thus negating the specific authority granted to it by Congress in Section 4(i) of the Communications Act.²⁰

In its inquiry into carrier practices restricting resale and sharing of their services, the Commission carefully considered the kind of procedure it would employ.²¹ The procedure followed by the Commission represents an enlightened, modern approach. It is not only within the agency's authority, but is clearly indicated by precedent and experience to be the preferable course in situations such as these. Indeed, any other course would inevitably bog the agency down in repetitive and costly individual adjudications. The Commission's authority to avoid such a result is clear.

decision-making process and enables an administrative agency to develop integrated plans in important policy areas.

* * * *

"When an administrative agency develops a general policy applicable on a prospective basis, courts have found it unnecessary to require evidentiary hearings. [citations omitted] This reluctance to prescribe evidentiary hearings on matters of general policy is grounded largely in practical considerations. Evidentiary hearings become 'totally unmanageable' when parties attempt to cross-examine the large numbers of persons normally interested in the development of policy."

²⁰ 47 U.S.C. § 154(i).

²¹ See Notice, ¶¶ 4, 32-35 (J.A. 13, 25-27); *Report & Order*, ¶ 2 (J.A. 29-30) and Appendix D (J.A. 117-126); *Memorandum Opinion and Order*, Docket No. 20097, released January 12, 1977, ¶¶ 2-9 (J.A. 153-159)—hereinafter cited as "*Reconsideration Order*".

II. THE PROCEDURES FOLLOWED BY THE COMMISSION WERE FULLY CONSISTENT WITH SECTION 205 OF THE COMMUNICATIONS ACT.

A. Section 205 Of The Act Is Not Mutually Exclusive With The Commission's General Rulemaking Authority.

In its brief AT&T argues basically that, because the general policy of unlimited resale and sharing of communications services had the effect of nullifying existing carrier tariff provisions to the contrary, the Commission's decision was therefore a "prescription" within the meaning of Section 205(a) of the Communications Act of 1934, as amended.²² Thus, argues AT&T, the "full opportunity for hearing" specified in Section 205(a) must be provided. According to AT&T, this requirement mandates a trial-type proceeding.

Assuming *arguendo* that the specific provisions of Section 205 were applicable below, the AT&T conclusion that the Commission's rulemaking approach below was insufficient to satisfy them is erroneous. AT&T cites no judicial authority squarely holding that Section 205 requires trial-type procedures.²³ Indeed, such a conclusion

²² 47 U.S.C. § 205(a) reads, in pertinent part:

"Whenever, after full opportunity for hearing, upon a complaint or under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this Act, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, . . .".

²³ AT&T's reliance on this Court's decision in the Telpak Sharing case, *AT&T v. FCC*, 449 F.2d 439 (1971), as justification for a requirement for trial-type hearings is misplaced. AT&T is correct that in the Telpak Sharing case, this Court emphasized that where

would be patently inconsistent with the Fourth Circuit's holding in *North Carolina Utilities Commission, supra*, at 47:

"We reject, as inconsistent with section 205, petitioners' contention that the Commission must complete a full-scale economic inquiry before implementing its registration program."

Despite the fact that the FCC in that case had established, *by rulemaking*, a registration program for the attachment of terminal equipment to telephone company lines inconsistent with existing carrier tariffs—thus requiring the filing of substantially revised tariffs in order to comply with the Commission's decision—there was "no

disputed factual issues of significance exist, a prescription of practices or rates can be validly ordered only if the Commission has first conducted the necessary hearings and complied with the finding requirements of Section 205(a). (AT&T Brief at 22) In that case, however, this Court made no attempt to define the parameters of the specific kind of hearing required by Section 205. Moreover, while the Commission had in fact conducted a trial-type hearing, this Court on review did not state that such a hearing was a statutory requirement. Rather, the Commission's prescription of unlimited sharing was reversed solely "for failure to conform to the requirements of § 205(a) that the prescribed practice be found to be 'just, fair, and reasonable' and that the prescribed rates be found to be 'just and reasonable'." (*Id.* at 442.) (It is significant that in the instant case the Commission made the requisite statutory finding (see *Report & Order*, ¶¶ 6, 41, 49; J.A. 32, 59, 64-65).) This Court's ruling following remand in the Telpak Sharing case, *National Association of Motor Bus Owners v. FCC*, 460 F.2d 561 (1972), did not hold that trial-type hearings were required by Section 205. The Court merely recited the Commission's own conclusion that prescription of unlimited sharing would have required a fuller record. The question whether an adequate record could have been developed only by trial-type hearings was not at issue. The more recent Supreme Court decision in *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224 (1973), indicates that it would not. In any event, the "mere fact that an agency has once regarded evidentiary hearings as appropriate does not bar it from adopting another policy when changing or new circumstances require a different approach." *Bell Telephone Co. of Pa., supra*, at 1264-65.

contention" that the hearing requirement of Section 205 had not been met. (*Id.* at 36.) Specifically quoting Section 205, the Fourth Circuit found that "all explicit statutory prerequisites for Commission action to prescribe carrier practices have been fulfilled." (*Id.* at 46.)

In passing upon similar arguments by railway carriers concerning the "hearing" requirement of Section 1(14) (a) of the Interstate Commerce Act (allowing the ICC to prescribe incentive per diem rates),²⁴ the United States Supreme Court definitively concluded that the hearing to be afforded by prescription statutes—similar to the one now before this court—does not preclude the use of rulemaking procedures nor require the use of trial-type adjudication. *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224 (1973). The choice is principally one in the agency's discretion.

B. To the Extent The Commission's Decision Was A "Prescription" Within The Meaning Of Section 205, The Hearing Requirements Of That Provision Have Been Met.

To the extent the Commission decision is deemed to have "prescribed" carrier practices, AT&T is correct in stating that Section 205(a) requires that a "full opportunity for hearing" must first be provided.²⁵ AT&T is plainly wrong, however, in asserting that only a trial-type proceeding will satisfy this requirement.²⁶ The "evidentiary" hearing sought by AT&T does not necessarily require formalized and time-consuming trial-type procedures. Factual "evidence"—to the extent it is necessary in a situation such as this—can be presented in a variety

²⁴ 49 U.S.C. § 1(14)(a).

²⁵ AT&T Brief at 20.

²⁶ *Id.* at 20-23.

of ways, a principal one being the rulemaking procedure followed by the Commission below.

As noted above, the United States Supreme Court has recently laid to rest the contention that a prescription of rates or practices can only be made following trial-type hearings such as AT&T apparently insists upon. In *Florida East Coast Ry. Co.*, *supra*, the Supreme Court sustained the Interstate Commerce Commission's utilization of rulemaking procedures to prescribe incentive per diem rates pursuant to Section 1(14)(a) of the Interstate Commerce Act.²⁷ The essential question before the Court was whether the hearing requirement of the statute could be satisfied by a rulemaking proceeding under Section 553 of the Administrative Procedure Act (APA),²⁸ or whether more formalized trial-type proceedings conducted pursuant to Sections 556 and 557 of the APA were required. Finding that reference to the APA, "in which Congress devoted itself exclusively to questions such as the nature and scope of hearings, is a satisfactory basis for determining" the meaning of the hearing requirement of another statute,²⁹ the Court concluded that "the Commission's proceeding was governed only by § 553 of that Act, and that appellees received the 'hearing' required by § 1(14)(a) . . .".³⁰

²⁷ 49 U.S.C. § 1(14)(a). Section 1(14)(a) provides, in part, that the "Commission may, after hearing, . . . establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad . . . including the compensation to be paid . . . for the use of any locomotive, car, or other vehicle not owned by the carrier using it . . .". In addition, the statute provides that in determining the amount of such compensation, the Commission should consider whether incentive elements should be included. The provision was enacted to remedy freight-car shortages then being experienced. 410 U.S. at 230-31.

²⁸ 5 U.S.C. § 553.

²⁹ 410 U.S. at 240.

³⁰ 410 U.S. at 227-28.

The APA, which governs proceedings before administrative agencies, sets forth two basic procedures for this purpose. Section 553 allows for so-called "notice and comment" rulemaking proceedings, similar to that followed by the Commission below. Sections 556 and 557 generally govern agency adjudications. They are also applicable to rulemakings when "required by statute to be made *on the record* after opportunity for an agency hearing." (5 U.S.C. § 553(c); emphasis added). The Supreme Court in *Florida East Coast Ry. Co., supra*, "emphasized the importance of this phrase ["on the record"] and virtually established it as a touchstone test of when section 556 and section 557 [i.e., trial-type] proceedings are required." *Mobil Oil Corp. v. FPC*, 483 F.2d 1238, 1250 (D.C. Cir. 1973).³¹ The triggering phrase "on the record" is also conspicuously absent from the statutory language of Section 205 of the Communications Act.³²

³¹ Referring to its earlier decision in *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972), the Supreme Court reaffirmed its holding there that the language of § 1(14)(a) authorizing the Commission to act "after hearing" was not the equivalent of a requirement that a rule be made "*on the record* after opportunity for an agency hearing" as that latter term is used in § 553(c) of the Administrative Procedure Act. (410 U.S. at 236-37; emphasis added.) The Supreme Court expressed particular disagreement with the lower court in that case that the phrase "on the record" carried no special meaning in terms of triggering the adjudicatory type proceedings of Sections 556 and 557, and concluded that "the phrase 'after hearing' in § 1(14)(a) . . . does not have such an effect." *Id.* at 238.

³² AT&T's reliance on *Independent Bankers Association of Georgia v. Board of Governors of the Federal Reserve System*, 516 F.2d 1206 (D.C. Cir. 1975), to the effect that trial-type procedures have been required even when the "on the record" requirement had been deleted from the statute is also misplaced. There, the court emphasized that despite the deletion of the phrase "on the record" the legislative history made very clear that Congress fully intended the continuation of trial-type hearings in all cases of specific individual protest. 516 F.2d at 1213-15. And unlike the instant pro-

In *Florida East Coast Ry. Co.*, *supra*, the Supreme Court carefully reviewed the hearing requirements of the Administrative Procedure Act—which the Court found to be a satisfactory guide to the type of hearing to be afforded under other statutory provisions, including Section 205 of the Communications Act (410 U.S. at 240)—and found that: (1) the rulemaking process of Section 553 of the APA is sufficient to satisfy the requirement in a prescriptive statute for a “hearing”;³³ (2) even a requirement for a hearing “on the record” may be satisfied by informal procedures; and finally, (3) the adjudicatory type procedures required by Sections 556-57 of the APA do not necessarily require trial-type hearings in all cases.³⁴ The dividing line, according to the Court, is one “recognized . . . in administrative law”; that is, it is the distinction “between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other.”³⁵ As has been shown above, this case falls squarely within the former category.³⁶

ceeding, the situation in *Independent Bankers* was “almost entirely adjudicative in character”, focusing “on the factual and legal merit of a single application by one holding company to engage in a specified activity.” (516 F.2d at 1217)

³³ 410 U.S. at 239-41.

³⁴ 410 U.S. at 241.

³⁵ 410 U.S. at 245.

³⁶ AT&T attempts to distinguish the Supreme Court’s holding in *Florida East Coast Ry. Co.*, *supra*, principally on the grounds that it was not concerned with the interpretation of Section 15(1) of the Interstate Commerce Act, upon which Section 205(a) of the Communications Act was modeled, but rather the provisions of Section 1(14)(a). (AT&T Brief at 24.) Noting, but not reciting the Supreme Court’s careful elucidation of the hearing requirements of the Administrative Procedure Act to which the Court looks for guidance, AT&T merely concludes that “whatever may be the significance of *Florida East Coast Ry. Co.*, it provides no justifica-

The fact that Section 205(a) of the Communications Act specifies a "full" opportunity for hearing does not justify a contrary conclusion. Indeed, in light of *Florida East Coast Ry. Co.*, *supra*, the conclusion is inescapable that only a statutory requirement that a hearing be made "on the record", or its equivalent, may be sufficient to mandate the adjudicatory trial-type proceedings of Sections 556 and 557.³⁷ The phrase "full opportunity for

tion here for disregarding the very different requirements of Section 205(a)." (AT&T Brief at 25.) To the contrary, the statutory requirements of Section 205 are not different. And AT&T conveniently ignores the fact that like Section 205, Section 1(14)(a) is a prescription statute.

In support of its contention that *Florida East Coast Ry. Co.* is inapposite, AT&T relies on *ICC v. Louisville & N.R.R. Co.*, 227 U.S. 88 (1913) and *Morgan v. United States*, 298 U.S. 468 (1936). The Supreme Court itself, however, distinguished those cases in *Florida East Coast Ry. Co.*, *supra*. We need not repeat the substance of the Court's views here. *Morgan v. United States*, *supra*, is treated at 410 U.S. at 242; *ICC v. Louisville & N.R.R. Co.*, is discussed at 410 U.S. at 244. The latter case, as the Tenth Circuit held in *Phillips Petroleum Co. v. FPC*, 475 F.2d 842, 849, n. 7 (1973), is "a pre-Administrative Procedure Act case which is fully out of harmony with that statute." (See also *Report & Order*, Appendix D, ¶ 6; J.A. 123-124.)

³⁷ 5 U.S.C. § 553(c); 410 U.S. at 234, 237-38. We again note that even in these cases, trial-type procedures are not always required. See 5 U.S.C. § 556(d) and 410 U.S. at 241. As the District of Columbia Circuit observed in *Mobil Oil Corp.*, *supra*, 483 F.2d at 1253, the "APA may be viewed as providing the outer boundaries of administrative procedures." The procedures outlined in Section 553 are "the minimum protections upon which administrative action may be based, according to interested parties a simple notice and right to comment." At the opposite end of the spectrum, the court notes, lie the requirements of Sections 556 and 557, "representing the highest degree of administrative protection that Congress believed would be necessary to protect interested parties." (*Id.*) In the absence of compelling statutory direction, the Commission is left free to select which of these procedures, or any combination of them, is best suited to its needs.

hearing" is not such an equivalent and the Commission's determination to this effect is entitled to great weight.³⁸

In 1956 the Supreme Court concluded that a similar requirement for a "full hearing" in Section 309(e) of the Communications Act,³⁹ was satisfied by rulemaking procedures undertaken pursuant to the Commission's broad powers. *United States v. Storer Broadcasting Company*, 351 U.S. 192 (1956). As the Supreme Court there explained, the method chosen to meet the "full hearing" requirement is left to the agency's own devising—to its informed judgment and discretion, exercised in light of particular circumstances and the practical necessities of efficient administration:

"We agree that a 'full hearing' under Section 309 means that every party shall have the right to present his case or defense by oral argument or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination *as may be required for a full and true disclosure of the facts* . . . (*Id.* at 202)

³⁸ *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367 (1969); *Commissioner v. Pepsi-Cola Niagara Bottling Corporation*, 399 F.2d 390 (2d Cir. 1968); *North American Utility Securities Corp. v. Posen*, 176 F.2d 194 (2d Cir. 1949); *NLRB v. Medo Photo Supply Corp.*, 135 F.2d 279 (2d Cir. 1943), *aff'd.*, 321 U.S. 678 (1944). As the Supreme Court summarized the applicable rule in *Red Lion Broadcasting Co.*, *supra*, at 380-81: "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." Accord, *Zemel v. Rusk*, 381 U.S. 1, *ren. denied*, 382 U.S. 873 (1965), and *Investment Company Institute v. Camp*, 401 U.S. 617 (1971), where the Supreme Court again stated (*Id.* at 626-27):

"It is settled that courts should give great weight to any *reasonable* construction of a regulatory statute adopted by the agency charged with the enforcement of that statute." [Emphasis added.]

³⁹ 47 U.S.C. § 309(e).

"We do not read the hearing requirement, however, as withdrawing from the power of the Commission the rule-making authority necessary for the orderly conduct of its business. . . . The Communications Act must be read as a whole and with appreciation of the responsibilities of the body charged with its fair and efficient operation." (*Id.* at 202-03; emphasis added)

The *Storer* holding that a "full hearing" requirement, such as is present in Section 205, can be satisfied by the rulemaking process was eloquently restated by the District of Columbia Circuit in *American Airlines, Inc. v. CAB*, 359 F.2d 624, 629 (1966) :

"[T]he *Storer* doctrine is not to be revised or reshaped by reference to fortuitous circumstances. It rests on a fundamental awareness that rule making is a vital part of the administrative process, particularly adapted to and needful for sound evolution of policy in guiding the future development of industries subject to intensive administrative regulation in the public interest, and that such rule making is not to be shackled, in the absence of clear and specific Congressional requirement, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rule making."

The *Storer* doctrine was followed by this Court in *Air Line Pilots Association v. Quesada*, 276 F.2d 892 (1960).⁴⁰

⁴⁰ In this connection, we note that the Natural Gas Act requires the FPC to conduct "full hearings" with respect to the filing of initial rates by new natural gas companies under 15 U.S.C. § 717c(e), but merely requires a "hearing" when the FPC investigates rates of existing natural gas companies under 15 U.S.C. § 717d(a). The FPC has construed both hearing requirements as virtually equivalent in that both are satisfied by informal rule-making procedures. *Re Area Rate Proceeding for Appalachian and Illinois Basin*, 44 F.P.C. 1112, 86 PUR3d 16 (1970). The authority to proceed other than by oral evidentiary hearings under the "full hearing" provision of Section 4(e) has been sustained in *American*

As the Commission concluded below,⁴¹ overwhelming judicial precedent clearly leads to the conclusion that the presence of the word "full" in Section 205(a) does not trigger the trial-type procedures of Section 556 and 557 of the Administrative Procedure Act. Indeed, the vast preponderance of judicial opinion—including principally that of the United States Supreme Court—conclusively demonstrates the error of AT&T's suggestions to the contrary. *Florida East Coast Ry. Co., Storer Broadcasting Co., SEC v. Chenery, supra.*⁴²

C. There Has Been No Showing By AT&T That The Commission's Use of Rulemaking Prejudiced Any Party Or Restricted The Ability Of Any Party To Submit Meaningful Evidence On The Issues Presented.

While it generalizes that the Commission's overall conclusions below are not supported by substantial evidence (AT&T Brief, pp. 52-61),⁴³ AT&T's specific complaint is far more narrow. According to AT&T, the Commission's

Public Gas Ass'n v. FPC, 498 F.2d 718, 722 (D.C. Cir. 1974). The same principle has been consistently applied against the contention that a "full hearing" necessarily means something more than a rulemaking proceeding. See *FPC v. Texaco Inc.*, 377 U.S. 33 (1964); *Railway Express Agency v. CAB*, 345 F.2d 445 (D.C. Cir. 1965).

⁴¹ *Report & Order*, App. D, ¶ 5; J.A. 120-22.

⁴² AT&T's erroneous characterization notwithstanding, (AT&T Brief at 43, n. 43), the Supreme Court in *Florida East Coast Ry. Co., supra*, did not draw attention to the possible "importance" of the *full hearing* requirement but, in fact, proceeded to assume that it did "not differ significantly from the 'hearing' requirement of § 1(14)(a)" (410 U.S. at 243; emphasis added.)

⁴³ We do not believe that AT&T has made any demonstration in this regard sufficient to overturn the Commission's decision below. AT&T's position in this matter, to the extent it is meaningfully argued on review, is adequately treated by the briefs of other parties, particularly that of the Federal Communications Commission.

decision not to conduct trial-type hearings "denied AT&T and other parties an opportunity to challenge and correct important errors of fact upon which the Commission's orders are based."⁴⁴ AT&T alleges that it was not "given an opportunity to test or challenge the validity of OTP's claims [in opposition to AT&T's economic impact submission] in an evidentiary hearing." AT&T is wrong on both counts; it was accorded four separate opportunities—over a two-year period—to submit evidentiary materials bearing on the issues and to rebut submissions offered by other parties.⁴⁵ Moreover, the *only* evidence which AT&T submitted to rebut the proposition that unlimited resale and sharing would be beneficial to the public⁴⁶—an economic impact study—was considered by the Commission in detail.⁴⁷

In the latter regard, the Commission's analysis revealed considerable doubt as to the AT&T study's reliability.⁴⁸ Nevertheless, assuming *arguendo* the complete validity of each of the study's conclusions and assumptions, it shows a net effect on the entire Bell System of

⁴⁴ AT&T Brief at 46.

⁴⁵ Like all other parties, AT&T was afforded an opportunity to submit initial, reply and response comments, as well as seek reconsideration of the Commission's order (which it did).

⁴⁶ Among the benefits envisioned by the Commission—with which AT&T does not take issue on review—were included: (1) more cost related rates (*R&O*, ¶ 75); (2) a stimulation of demand for communications services (*R&O*, ¶¶ 75, 87); (3) an improvement in management of specialized communications networks (*R&O*, ¶ 77); (4) forecasting assistance to AT&T (*R&O*, ¶ 80); (5) more efficient utilization of private line services (*R&O*, ¶ 85); and (6) additional incentives for research and development and technological improvements (*R&O*, ¶¶ 86, 88). See J.A. 78-83.

⁴⁷ See *Report & Order*, ¶¶ 56-62; J.A. 68-70.

⁴⁸ *Report & Order*, ¶¶ 60-62; J.A. 69-70.

only \$178.5 million annually.⁴⁹ As the Commission pointed out at note 68 of its *Report & Order*, this represents only 0.75% of Bell System 1973 revenues; hardly a significant impact. It is particularly noteworthy in this regard that the Commission found "no evidence in [the] record that allowing resale will lower carrier revenues to the point that it will impact on service to the public".⁵⁰

It is incumbent upon AT&T to show that the Commission's use of trial-type procedures in the resolution of the issues would have made a difference in the agency's decision to proceed either by rulemaking or adjudication. *Upjohn Co. v. Finch*, 422 F.2d 944, 955 (6th Cir. 1970); *American Public Gas Association v. FPC*, 498 F.2d 718 at 723 (D.C. Cir. 1974). Clearly, AT&T has failed to meet this burden here. For it merely asserts, without meaningful support, that if a trial-type hearing had been conducted: (1) the claims of other parties, principally OTP, "would have been subject to detailed analysis and rebuttal"; (2) AT&T would have been permitted to show the "continuing validity" of its economic study following changes in the scope of the Commission's *Report & Order*; and (3) that AT&T "could have offered economic evidence addressed specifically to concrete proposals."⁵¹ But AT&T's contentions in this regard merely beg the principal question at issue in this appeal. For they do not even purport to suggest to this Court why rulemaking was inadequate either to permit such "detailed analysis" or to offer "economic evidence addressed to concrete pro-

⁴⁹ This figure assumes the unlimited resale and sharing of WATS. Since the Commission ultimately did not require the removal of restrictions on resale and sharing of WATS, the revenue loss is obviously overstated. See *Report & Order*, note 68 (J.A. 69) and *Reconsideration Order*, ¶ 15 (J.A. 162-64).

⁵⁰ *Report & Order*, note 62; J.A. 58.

⁵¹ AT&T Brief at 47-48.

posals", and why only a trial-type proceeding would have satisfactorily accomplished those tasks.⁵²

CONCLUSION

In view of the foregoing, this Court should find that the Commission acted within the bounds of its permissible discretion in utilizing rulemaking procedures to resolve the issues presented below, and should affirm the Commission's decision to proceed on that basis.

Respectfully submitted,

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⁵² The Commission's Notice herein provided yet another procedural avenue of which AT&T decided not to avail itself. At paragraph 34 the Commission states "that it will consider requests for further proceedings should interested persons believe that they are being prejudiced by the procedures established." (J.A. 26.) The Commission cautioned that such requests "should be specific as to the issue requiring further evidence and the reasons why prejudice will result if such further proceedings are not held." (*Id.*) Notwithstanding its suggestion for a one-day conference to "explore fully the nature of the [Commission's] Order" (AT&T Petition for Reconsideration, pages 1-2; J.A. 1457-58), AT&T has made no such request to the Commission.



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